

### **REMARKS**

This communication responds to the Office Action mailed January 22, 2007.

Claims 1, 4, 13, 14, 16, 19, 27-35, and 43-44 were previously canceled. Therefore, claims 2, 3, 5-12, 15, 17, 18, 20-26 and 36-42 are pending.

The §§ 112, first and second paragraph and 103(a) rejections of the claims are respectfully traversed in view of the below discussion.

#### **Rejection of Claims 5, 20 and 39 under 35 U.S.C. § 112**

Claims 5, 20 and 39 were rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

The § 112, first paragraph rejection is respectfully traversed. The Examiner's statement at page 2 of the Office Action, "[t]he specification does not disclose that the suspension forms a discrete layer and there is no disclosure of the IQF fruit and suspension migrating together," is incorrect.

As stated in the Office Action response of November 13, 2006, support for the amendments to claims 5, 20 and 39 can be found in the specification at least at page 5, line 24 to page 6, line 12. In particular, with respect to the suspension forming a discrete layer, the specification states in reference to Figure 1, "[t]he suspension 108 is deposited over the IQF fruit 106 in the pie shell 104." From Figure 1, the suspension layer before the baking process is generally above the IQF fruit layer. And compared to Figure 2, which depicts the pie after baking, with the suspension having migrated with the IQF fruit, Figure 1 shows that the suspension 108 generally forms a discrete layer.

According to MPEP § 2163.02, "[t]he subject matter of the claim need not be described literally (i.e., using the same terms or in haec verba) in order for the disclosure to satisfy the description requirement." Thus, although the recitations of:

"depositing a suspension compound over said IQF fruit in said pie shell wherein in an initial state, said suspension compound generally forms a discrete layer," from claim 5;

"depositing a suspension over said IQF fruit in said pie shell, wherein said suspension in an initial state, generally forms a discrete layer," from claim 20; and

"adding a suspension over the IQF fruit in the pie shell, which, in an initial state, generally forms a discrete layer," from claim 39

are not literally described in the specification, the amendment is supported by the specification at page 5, line 25 to page 6, line 12 and by Figures 1 and 2.

With respect to the claim 5, 20 and 39 recitation related to IQF fruit and suspension migrating together, support for the amendment of November 13, 2006 to claims 5, 20 and 39 can be found in the specification where it states, “[t]he suspension 108 provides a medium that moves between the fruit pieces during the bake process. Thus, the suspension 108 distributes the setting agents and flavors uniformly where space between the fruit allows.” *Specification, page 5, lines 27-29*. In addition, the specification states “[a]s illustrated in Figure 2, a slice of the pie has been removed from a frozen fruit filled pie that has already been baked. . . . The cross-sectional view of the pie shows that the IQF fruit 106 are suspended in the pie filling and evenly distributed throughout the inside of the pie. The suspension and even distribution of the fruit is made possible by unique characteristics of the suspension 108.” *Specification, page 6, lines 3-8*.

Further, Figure 1 shows a frozen fruit filled pie and the ingredients that are used to manufacture the pie, and Figure 2 is a cross-sectional view of the frozen fruit filled pie showing the suspension of the IQF fruit and pie ingredients after the pie has been baked. It can be seen from Figures 1 and 2 that the suspension and IQF fruit migrate together so that after the baking process, an IQF fruit suspension is formed.

According to MPEP § 2163.02, “[t]he subject matter of the claim need not be described literally (i.e., using the same terms or in haec verba) in order for the disclosure to satisfy the description requirement.” Thus, although the recitation:

baking the frozen fruit filled pie product, wherein the suspension layer in the initial frozen state exhibits a reduction of viscosity when exposed to heat causing the suspension layer to disperse around the IQF fruit, and wherein the suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit, such that in a baked state, the suspension layer and the IQF fruit migrate together to form an IQF fruit suspension,

from claims 5, 20 and 39 is not literally described in the specification, the claim amendment from November 13, 2006 is supported by the specification and by Figures 1 and 2.

Claims 5, 20 and 39 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The § 112, second paragraph rejection is respectfully traversed. The Examiner's statement that "[t]he specification does not define how the fruit migrate," is incorrect. This is because the specification states "[u]niform distribution of ingredients in pie filling is desired by consumers in the finished product quality. . . . **The suspension 108 provides a medium that moves between the fruit pieces during the bake process. Thus, the suspension 108 distributes the setting agents and flavors uniformly where space between the fruit allows.**" *Specification, page 5, lines 25-29.*

Further, Figure 1 shows a frozen fruit filled pie and the ingredients that are used to manufacture the pie, and Figure 2 is a cross-sectional view of the frozen fruit filled pie showing the suspension of the IQF fruit and pie ingredients **after** the pie has been baked. The specification states: "[a]s illustrated in Figure 2 . . . [t]he cross-sectional view of the pie shows that the IQF fruit 106 are suspended in the pie filling and evenly distributed throughout the inside of the pie. The suspension and even distribution of the fruit is made possible by unique characteristics of the suspension 108." *Specification, page 6, lines 3-8.* It can be seen from Figures 1 and 2 that the suspension and IQF fruit migrate together so that after the baking process, an IQF fruit suspension is formed.

According to the specification and as illustrated in Figures 1 and 2, the **baking process causes the suspension to move between the fruit pieces** and as a result, the suspension layer and the IQF fruit migrate together to form an IQF fruit suspension. According to MPEP 2173.01, an applicant:

can define in the claims what they regard as their invention essentially in whatever terms they choose. . . . Applicant may use functional language, alternative expressions, negative limitations, or any style of expression or format of claim which makes clear the boundaries of the subject matter for which protection is sought.

*See MPEP § 2173.01.* Therefore, the recitation "the suspension layer and the IQF fruit migrate together to form an IQF fruit suspension," from claims 5, 20 and 39 is supported by the specification and by Figures 1 and 2, applicants can define in the claims what they regard as their invention in whatever terms they choose, the § 112, second paragraph rejection is improper, and reconsideration and withdrawal of the § 112, second paragraph rejection are requested.

**Rejection of Claims 2-3, 5-12, 15, 17-18, 20-26 and 36-42 under 35 U.S.C. § 103**

Claims 2-3, 5-12, 15, 17-18, 20-26 and 36-42 were rejected under 35 U.S.C. § 103(a) over the cookbook "Recipe encyclopedia" (hereinafter "the apricot pie recipe") in view of Brain et al. (hereinafter "Brain"), the background of Applicant's specification and Wallin et al. (hereinafter "Wallin").

The § 103(a) rejection is respectfully traversed for at least the following reasons, which are in addition to the reasons for traverse filed in the Responses dated June 22, 2006 and November 13, 2006, at least with respect to Wallin.

The present invention discloses a pie filled with frozen fruit and teaches a method for manufacturing a pie filled with frozen fruit that includes the steps of mixing ingredients to create pie dough; forming a portion of said pie dough into a pie shell; adding individually quickly frozen ("IQF") fruit into said pie shell; depositing a suspension compound over said IQF fruit in said pie shell wherein in an initial state, said suspension compound generally forms a discrete layer, and wherein said suspension compound comprises: a range of about 38% to about 88% liquid sweetener; a range of about 5% to about 55% dry sweetener; a range of about 4% to about 15% food starch; and a range of about 0.01% to about 5% food gum; and applying a top sheet of pie dough over said suspension layer, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said IQF fruit remains frozen throughout the manufacturing process; transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product, wherein the suspension layer in the initial frozen state exhibits a reduction of viscosity when exposed to heat causing the suspension layer to disperse around the IQF fruit, and wherein the suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit, such that in a baked state the suspension layer and the IQF fruit migrate together to form an IQF fruit suspension.

The present invention is also directed toward a method for suspending frozen fruit in a pie filled with frozen fruit having ingredients of various specific gravities which includes the following steps: mixing a first set of ingredients to form a suspension, said suspension comprised of: a range of about 38% to about 88% liquid sweetener; a range of about 5% to about 55% dry sweetener; a range of about 4% to about 15% food starch; and a range of about 0.01% to about 5.0% food gum; mixing a second set of ingredients to create pie dough; forming a portion of said pie dough into a pie shell; adding individually quickly frozen ("IQF") fruit into said pie shell;

adding said suspension over said IQF fruit in said pie shell, wherein in an initial state, said suspension generally forms a discrete layer; and applying a top sheet of pie dough over said suspension layer, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said IQF fruit remains frozen throughout the manufacturing process; transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product, wherein the suspension layer in the initial frozen state exhibits a reduction of viscosity when exposed to heat allowing the suspension layer to disperse among the IQF fruit, and wherein the suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit, such that in a baked state the suspension layer and the IQF fruit migrate together to form an IQF fruit suspension.

As can be seen, the method for forming a suspension also includes the unique features described above in which **in a baked state, the suspension and the IQF fruit migrate together to form an IQF fruit suspension.** This is also an advantage over the prior art because, as claimed, the liquid suspension is deposited over the IQF fruit once the IQF fruit has been added to the pie shell, rather than being mixed together with the IQF and deposited as a mixture onto the pie shell.

The above-mentioned benefit provided by the present invention provides the consumer with a finished pie having characteristics desirable to the customer. For example, when dry ingredients are added to the IQF fruit, the finished product does not result in a glossy suspension, a feature attractive to the consumer. In addition, use of the above methods reduces production times and energy costs compared to typical methods. For example, because the IQF fruit and suspension are not mixed together during production, the time and energy typically required for such a mixing step is eliminated. Thus, profitability of producing pie products is increased.

Now the references of record are considered.

The apricot pie recipe, in contrast to the present invention, is a recipe for making a home-made pie, which uses apricot pie filling.

In contrast to the present invention, Brain discloses methods for incorporating fat mimetics into recipes for non-fat food products that includes a pie glaze recipe.

Wallin, in contrast to the present invention, discloses a high stability, high flavor, breakfast pastry and method for preparing the same.

The apricot pie recipe, Brain and Wallin, alone or in combination, fail to teach, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention.

In particular, the present invention includes a suspension for a frozen fruit pie, in which, the suspension **in a baked state, migrates together with the IQF fruit to form an IQF fruit suspension.**

The apricot pie recipe, in contrast, provides instructions on combining canned apricot halves with apricot pie filling in a pie pastry and then baking the pie. The apricot pie recipe does not teach or suggest a particular pie filling recipe in order to result in a pie filling having such characteristics. That is, the apricot pie recipe does not indicate that after baking, the pie filling and apricot halves will have formed a suspension. Therefore, the apricot pie recipe fails to provide any motivation or expectation of success to one of ordinary skill in the art to provide **a suspension which, in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.**

Brain, in contrast to the invention, discloses a pie glaze preparation in which the ingredients are heated in a kettle to about 200 °F, is “deaerated and hot filled into suitable containers at a temperature of about 175 °F.” *Brain, col. 13, lines 3-7.* Accordingly, Brain discloses preparation of a pie filling, but **does not disclose a pie preparation method or characteristics the pie filling will have when used during a pie preparation method.** Therefore, Brain fails to provide any motivation or expectation of success to one of ordinary skill in the art to provide **a suspension which, in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.**

Wallin, in contrast to the invention, discloses a pastry filling having a controlled pH and viscosity. However, Wallin does not teach or suggest how the filling is prepared in order to result in a filling having such characteristics. Therefore, Wallin fails to provide any motivation or expectation of success to one of ordinary skill in the art to provide **a suspension which, in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.**

The apricot recipe, Brain and Wallin, alone or in combination, fail to teach, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention’s **suspension which, in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.**

It is well settled that it is not proper to selectively extract individual elements from the different contexts of different references and then combine those selectively extracted elements to arrive at a claimed combination. Rather, in considering the elements within the references, the references must be considered as a whole, it being impermissible to pick and choose from a reference only so much of it as will support a given position. *In re Wesslau*, 353, F.2d 238, 147 USPQ 391 (CCPA 1965); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). There is a rigorous requirement that there must be some motivation, suggestion or teaching of the desirability for selecting the elements and combining those elements in the specific combination of the invention, and the motivation, suggestion or teaching must be disclosed in the reference(s). *In re Kotzab*, 217 F.3d 1365, 54 USPQ2d 1308, 1316 (Fed. Cir. 2000); *In re Oetiker*, 977 F.2d 14343, 24 USPQ2d 1443 (Fed. Cir. 1992). In the absence of such motivation, suggestion or teaching, it is immaterial that some, or even all, of the elements in a specific combination of an invention are known in the art. As clearly stated in *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453 (Fed. Cir. 1998):

As this court has stated, “virtually all [inventions] are combinations of old elements.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713F2d 693, 698,218 U.S.P.Q. (BNA) 865, 870 (Fed. Cir. 1983); *see also Richdel, Inc. v. Sunspool Corp.*, 714 F2d 1573, 1579-80, 219 U.S.P.Q. (BNA) 8, 12 (Fed. Cir. 1983) (“Most, if not all, inventions are combinations and mostly of old elements.”). Therefore an examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentability of the claimed invention. Such an approach would be “an illogical and inappropriate process by which to determine patentability.” *Sensonics, Inc.. v. Aerosonic Corp.*, 81 F.3d 1566, 1570, 38 U.S.P.Q.2D (BNA) 1551,1554 (Fed. Cir. 1996).

and:

To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the examiner to show a motivation to combine the references that create the case of obviousness. In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.

In the present case, the examiner believes that the recitations of the claims are taught by a combination of the cited references. However, “there is no basis for concluding that an invention would have been obvious solely because it is a combination of elements that were known in the art at the time of the invention.” *Smiths Ind. Medical Sys., Inc. v. Vital Signs, Inc.*, 183 F.3d 1347 (Fed. Cir. 1999) (referencing *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556 (Fed. Cir. 1985)). Accordingly, even if a suspension is known to migrate together with IQF fruit to form an IQF fruit suspension by one of skill in the art, the claims of the present invention are not obvious. This is because, as also discussed above, neither the apricot recipe, Brain or Wallin provide any motivation or expectation of success to one of ordinary skill in the art to modify the apricot recipe to employ a suspension which, in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.

Moreover, as stated in *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d (BNA) 1614 (Fed. Cir. 1999):

Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. See, e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2D (BNA) 1225, 1232 (Fed. Cir. 1998) (describing “teaching or suggestion or motivation [to combine]” as an “essential evidentiary component of an obviousness holding”). Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight. See, e.g., *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138, 227 U.S.P.Q. (BNA) 543, 547 (Fed. Cir. 1985) (“The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that



existed at the time.”). In this case the Board fell into the hindsight trap.

Nonetheless, the Examiner uses the present invention as a blueprint for piecing together the apricot recipe, Brain and Wallin because none of the cited references teaches or suggests a method for manufacturing a *pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process* as recited by the independent claims. The Examiner states “It would have been obvious to convey the pie in a frozen state when IQF fruit is used because the fruit is frozen. It is obvious the fruit remains frozen because frozen fruit is used and there is no indication the fruit will thaw during processing.” *Office Action, pages 3-4*. However, the Examiner does not point to any portions of the cited apricot recipe, Brain and Wallin references, which provides any motivation or expectation of success to one of ordinary skill in the art to experiment in order to maintain the IQF fruit in a frozen state. Instead, the apricot recipe indicates that apricot pie filling is spread over the apricot halves, and there is no indication that the apricot pie filling is cooled or frozen or that the pie assembly process is somehow conducted so that the apricots remain or become frozen. Thus, any fruit added, whether apricots or other fruit, if it were initially frozen, which there is no indication of the fruit being initially frozen in the apricot pie recipe, would begin to thaw once the apricot pie filling is added. Accordingly, the apricot pie recipe does not provide any motivation or expectation of success to one of ordinary skill in the art to experiment with the pie filling in order to maintain fruit in a frozen state throughout the manufacturing process. Brain discloses that the pie filling is “deaerated and hot filled into suitable containers at a temperature of about 175 °F.” *Brain, col. 13, lines 3-7*. Accordingly, in Brain, if the suitable container were a pie pastry, adding the pie filling to it would cause any frozen fruit to rapidly thaw. Therefore, Brain does not provide any motivation or expectation of success to one of ordinary skill in the art to experiment with the pie filling in order to maintain fruit in a frozen state throughout the manufacturing process. In fact, one could deduce from Brain, that adding the filling at 175 °F is acceptable, and thus Brain teaches away from pie production methods in which the frozen fruit remains frozen during the pie production process. Wallin does not disclose conditions in which the pastry filling is prepared. Therefore, Wallin does not provide any motivation or expectation of success to one of ordinary skill in the art to experiment with the pastry filling, or to experiment with frozen fruit and pastry filling.

Accordingly, one of ordinary skill in the art would not look to the apricot pie recipe, Brain or Wallin when attempting to develop a method for manufacturing a pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process. Therefore, the Examiner has used impermissible hindsight, has failed to establish a *prima facie* case of obviousness, and thus the combination of the apricot recipe, Brain and Wallin is improper.

In view of the above, even if the asserted apricot recipe, Brain and Wallin combination is proper, which it is not, the cited references do not render independent claim 5, 20, and 39 obvious. The combination would not teach a pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process that includes a suspension that in a baked state, migrates together with IQF fruit to form an IQF fruit suspension.

Further, because the Examiner does not point to any portions of the cited apricot recipe, Brain and Wallin references, which provides any motivation or expectation of success to one of ordinary skill in the art to experiment in order to maintain the IQF fruit in a frozen state, it appears that the Examiner has impermissibly ignored the claimed pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process. This recitation is material to the claimed invention, and the absence of an explicit claim requirement from a reference cannot reasonably construed as an affirmative statement that the requirement is in the reference. *In re Evanega*, 829 F.2d 1110 (Fed. Cir. 1987). Accordingly, the Examiner's statement that "It would have been obvious to convey the pie in a frozen state when IQF fruit is used because the fruit is frozen. It is obvious the fruit remains frozen because frozen fruit is used and there is no indication the fruit will thaw during processing," (*Office Action*, pages 3-4) is incorrect because the claimed pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process is missing from the prior art.

Moreover, the Examiner's statement discussed above, i.e., "It would have been obvious to convey the pie in a frozen state when IQF fruit is used because the fruit is frozen. It is obvious the fruit remains frozen because frozen fruit is used and there is no indication the fruit will thaw during processing" (*Office Action*, pages 3-4), is against logic. To maintain IQF fruit in a frozen state, the IQF fruit would need to remain at a temperature of about 32 °F. Without indicating otherwise, it is presumed that the cited pie preparation processes are performed at room temperature, e.g., 70-75 °F, and when assembling a pie at room temperature, IQF fruit would tend to thaw when subjected to a room temperature environment and/or when other ingredients

having a temperature of 70-75°F are added. Therefore, the Examiner's statement that "there is no indication the fruit will thaw during processing," does not coincide with the laws of thermodynamics.

The remaining dependent claims, claims 2, 3, 6-12, 15, 17, 18, 21-26, 36-38 and 40-42, depend directly or indirectly from claims 5, 20, and 39 and are allowable for at least the same reasons, further in view of their additional recitations.

It is believed that all of the issues raised in the Office Action have been addressed herein. Should the Examiner maintain any of the rejections of any of the pending claims, it is respectfully requested that it be pointed out with particularity how the cited reference(s) meet each and every term of each claim with respect to which rejection is maintained, and if the rejection is based on obviousness, identification of the specific motivation, suggestion or teaching in the art for combining elements in the specific combination of the invention.

For the above reasons, reconsideration and withdrawal of the § 103 rejection is requested.

**CONCLUSION**

This application now stands in allowable form, and reconsideration and allowance are respectfully requested.

No fee is deemed necessary. The commissioner is authorized to charge any additional fees, including extension fees or other relief that may be required, or credit any overpayment to Deposit Account No. 04-1420.

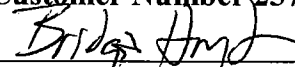
Respectfully submitted,

DORSEY & WHITNEY LLP

**Customer Number 25763**

Date: April 23, 2007

By: \_\_\_\_\_

  
Bridget Hayden, Esq., Reg. No. 56,904  
Phone: (612) 492-6867